

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PATRICK DANIEL CULLEN,

Defendant-Appellee.

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UNPUBLISHED

October 4, 2007

No. 272986

Kalamazoo Circuit Court

LC No. 06-000060-FH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted from a sentence of three years' probation, with 60 days to be served in jail "subject to review," for defendant's plea-based conviction of operating a vehicle while under the influence of intoxicating liquor, third offense (OUIL third), MCL 257.625(9)(c). We reverse and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

OUIL third is a Class E felony subject to the statutory guidelines. MCL 777.12f. The guidelines as scored placed defendant in the D-II category, for which the minimum sentence range is 7 to 23 months. MCL 777.66. Therefore, the court could impose a prison sentence with a minimum term within the range of 7 to 23 months or an intermediate sanction that may include up to a year in jail. MCL 769.34(4)(c). However, "[i]f the Michigan vehicle code . . . mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code . . . authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure" from the guidelines. MCL 769.34(2)(a).

At the time defendant committed the instant offense, § 625 of the Michigan vehicle code specified that upon a conviction of OUIL third,

the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and to either of the following:

(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively. [MCL 257.625(9)(c).]

Section 625(9)(c) “provides two alternate mandatory minimum sentences, either of which may be imposed. The provisions of MCL 769.34, including MCL 769.34(2), apply to a sentence imposed under MCL 257.625(9)(c).” *People v Hendrix*, 471 Mich 926; 689 NW2d 229 (2004). In addition, “[a] term of imprisonment imposed under subdivision (b) or (c) shall not be suspended.” MCL 257.625(9)(d).

The suspension of a sentence temporarily or indefinitely postpones the judgment of the court. *People v Stickle*, 156 Mich 557, 564; 121 NW 497 (1909). Black’s Law Dictionary (8th ed) defines “suspended sentence” as a sentence that is “postponed so that the defendant is not required to serve time unless he or she commits another crime or violates some other court-imposed condition.” Accord *United States v Gajdik*, 292 F3d 555, 558 (CA 7, 2002); *Krebs v State*, 816 NE2d 469, 475 n 10 (Ind App, 2004). In other words, the defendant is not required to serve the sentence at the time it is imposed. *Richards v Crump*, 260 SC 133, 136; 194 SE2d 575 (1973). Thus, a suspended sentence is one that is imposed by the court, which the defendant may or may not be required to serve at a later date even though, as a practical matter, the defendant usually is not required to serve the sentence.

When the court in this case imposed a 60-day jail sentence “subject to review,” meaning that the court would consider at a later date whether it would require defendant to serve the jail sentence, it in effect imposed a suspended sentence in violation of § 625(9)(d). Therefore, the sentence was invalid and resentencing is required.

We reverse and remand for resentencing in accordance with MCL 257.625(9)(c). We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Karen M. Fort Hood